# Supreme Court of the United States

OCTOBER TERM, 1940.

No. 585

In the Matter

of

The Petition of COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO for exemption from or limitation of its liability as owner of the Steamship MANDU.

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,
*Petitioner.*

GREAT AMERICAN INSURANCE COMPANY,
*Respondent.*

**BRIEF IN OPPOSITION TO PETITION OF COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.**

FORREST E. SINGLE,
*Counsel for Great American Insurance Company, Respondent.*

CHAUNCEY I. CLARK,
DOUGLAS D. CRYSTAL,
*Counsel.*

## SUBJECT INDEX


PAGE

Brief in Opposition to Petition of Companhia De Navegacao Lloyd Brasileiro for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit ..... 1

Facts ..... 2

POINT I. The decision of the Circuit Court of Appeals that Great American Insurance Company was a proper claimant was the only possible decision under the facts. This decision is not in conflict with any decision of this Court or of any other Court in the United States ..... 5

POINT II. Shipowner was not in any way "misled" into filing its petition for limitation of liability ..... 9

POINT III. There is no conflict between the decision of the Circuit Court of Appeals and the decision of this Court in Canada Malting Co. v. Patterson, 285 U. S. 413 ..... 12

POINT IV. The decision of the Circuit Court of Appeals in holding the MANDU contributorily at fault is not in conflict with the decisions of this Court or the decision of any other Court. However, in arriving at its decision providing that only one-fifth of cargo-claimant damages be recovered from the MANDU rather than one-half, as allowed by the District Court, the Circuit Court of Appeals made an erroneous appraisal of the gravity of the faults of the respective vessels in so far as these faults contributed to the damages sustained by cargo-claimant ..... 14

Conclusion ..... 20

## Authorities Cited


| | PAGE |
|---|---|
| Aunt Jemima Mills Co. v. Lloyd Royal Belge (Bourgondier, The, 34 F. [2d] 120) | 7 |
| Benedict on Admiralty, 1st Ed., p. 24 | 5 |
| Benedict on Admiralty, 5th Ed., Secs. 244, 322 | 7 |
| Benjamin M. Merklin, Jr. v. Johnson & Higgins, *et al.*, 1933 A. M. C. 1110 | 9 |
| Bull Steamship Co. v. U. S., 34 F. (2d) 614 | 17 |
| Canada Malting Co. v. Patterson, 285 U. S. 413 | 12, 13 |
| Chubb v. Hamburg-American Packet Co., 39 Fed. 439 | 9 |
| Coamo, The, 280 Fed. 282 | 19 |
| Dingfelder v. Navigazione Libera Triestina, 2 F. Supp. 929 | 9 |
| Fretz v. Bull, 12 How. (53 U. S.) 465 | 5 |
| In Re Great Lakes Transit Corp., 81 Fed. (2d) 441 | 9 |
| J. V. Lane & Co., Inc. v. M. S. California, 1934 A. M. C. 179 | 9 |
| Manitoba, The, 122 U. S. 97 | 17 |
| Martello, The, 153 U. S. 62 | 17 |
| May v. Hamburg-Amerikanische Packetfahrt, etc., 290 U. S. 333 | 8 |
| National Interocean Corp. v. Emmons Coal Mining Corp., 270 Fed. 997 | 7 |
| Postal Steamship Corp. v. El Isleo, 308 U. S. 378 | 16 |
| Quoque, The, 47 F. (2d) 873 | 16 |
| Thames, The, 81 U. S. 98 | 6 |

# Supreme Court of the United States

OCTOBER TERM, 1940.

In the Matter

of

The Petition of COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO for exemption from or limitation of its liability as owner of the Steamship MANDU.

COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO,
Petitioner.

GREAT AMERICAN INSURANCE COMPANY,
Respondent.

No. 585.

## BRIEF IN OPPOSITION TO PETITION OF COMPANHIA DE NAVEGACAO LLOYD BRASILEIRO FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

In order to avoid any possible confusion between this petition filed by Companhia De Navegacao Lloyd Brasileiro and that filed by the Great American Insurance Company, we shall in this reply brief refer to Companhia De Navegacao Lloyd Brasileiro, owner of the MANDU, as "shipowner", and to the Great American Insurance Company as "cargo claimant".

The reasons which shipowner asserts should motivate this Court to grant shipowner's writ of certiorari are four:

1. Shipowner urges that a "bare assignee" (which Great American Insurance Company is not), is not entitled to claim in a petition for limitation of liability brought by the shipowner.

2. Shipowner urges that although this litigation has proceeded for ten years, including two appeals to the Circuit Court of Appeals for the Second Circuit, all at the instance of petitioner by virtue of its filing petition for limitation of liability, this Court at this date should decide that the courts of the United States had no jurisdiction of the petition which it filed for the reason that cargo claimant "misled" shipowner into filing its petition.

3. Shipowner urges that the decision of the Circuit Court of Appeals for the Second Circuit in retaining jurisdiction in this action *instituted by shipowner* was an abuse of discretion.

4. Shipowner urges that the decision of the Circuit Court of Appeals for the Second Circuit in holding that faults of the MANDU contributed to the collision is in conflict with the decisions of this Court.

## Facts.

The facts are not stated in the petition of Great American Insurance Company for writ of certiorari, but inasmuch as the petition of Companhia De Navegacao Lloyd Brasileiro for writ of certiorari in the same case depends in part upon the facts, we are stating the facts here briefly for the convenience of the Court.

The MANDU was outward bound from the harbor of Santos, Brazil, and her course lay westerly through a narrow channel, the northerly side of which was marked

by three black buoys with flashing white lights spaced about 1800 meters apart.

The conditions of visibility were favorable, and lights could be seen at a distance of several miles. There was no wind or tide to impede navigation.

Shortly after the MANDU dropped her pilot she sighted the DENDERAH, inbound, displaying a blue light as a signal for a pilot.

The story of the collision as told by the witnesses for the MANDU and the DENDERAH was strongly conflicting. The MANDU witnesses state that when the vessels were about a mile apart she sounded a one-blast whistle signal and that when no answering signal was sounded by the DENDERAH the MANDU sounded a second one-blast signal, which also was not answered by the DENDERAH. A quarter of a mile astern of the MANDU was another outbound vessel, the WEST CALUMB, which, these witnesses state, sounded a two-blast signal, and the DENDERAH answered with two blasts. The navigators of the MANDU assumed, so their story continues, that the DENDERAH had answered the WEST CALUMB and thereupon sounded a third one-blast signal, which the DENDERAH answered with one blast. The MANDU and the DENDERAH were then about one-half a mile apart, and they estimate that four minutes later the vessels came into collision at right angles at the turn in the channel on the MANDU'S starboard side of the channel, the MANDU'S bow cutting into the starboard side of the DENDERAH just forward of the bridge. Shortly afterward the DENDERAH sank.

According to the witnesses of the DENDERAH, the whistle signals and maneuvers were vastly different. The first signal sounded was a 2-blast signal sounded by the MANDU. At that time the MANDU was in midchannel and proceeding at full speed. Notwithstanding her 2-whistle signal no change of course to port was made. The DEN-

DERAH assented to the 2-whistle signal and changed her course to port. Shortly thereafter the MANDU gave a 1-signal blast indicating that she was directing her course to starboard. The DENDERAH answered this 1-blast signal with a 1-blast signal, thus assenting to the change of maneuver suggested by the MANDU and directed her course to starboard. The MANDU again made no change of course whereupon the DENDERAH's engines were put full speed astern, but the MANDU came at full speed, crashing into the DENDERAH a distance of 18 feet. The DENDERAH, they state, was at all times on her starboard side of the channel, and that is where the collision occurred.

Two independent and unprejudiced witnesses, the Captain and Third Mate, who were on the bridge of the American steamship WEST CALUMB which was following the MANDU out of port, corroborated the story of the DENDERAH, both as to the whistle signals exchanged—the WEST CALUMB officers testified that the 2-blast signals were given by the MANDU and not by the WEST CALUMB and also corroborated the testimony that the collision occurred on the DENDERAH's starboard side of the channel.

At the time of the collision the DENDERAH was practically standing still in the water, but the MANDU was proceeding at high speed, characterized by the District Court as "excessive" speed (R. 2710) and by the Circuit Court of Appeals as "very considerable" speed (R. 2208).

The cargo in No. 2 hold, where the collision occurred, consisted of two locomotives and accessories, steel pipe, barrels of gypsum and steel rails. Notwithstanding this highly resistant type of cargo, the MANDU's bow struck the DENDERAH's steel hull with such force that her stem penetrated the MANDU's side to such a distance that her No. 2 hatch was bent in (R. 2633; 4836). The DENDERAH became a total loss together with a large portion of her cargo.

## POINT I.

**The decision of the Circuit Court of Appeals that Great American Insurance Company was a proper claimant was the only possible decision under the facts. This decision is not in conflict with any decision of this Court or of any other Court in the United States.**

Point I of shipowner's brief refers to the "bare" assignment made to the Great American Insurance Company. Apparently, shipowner would have this Court believe that cargo claimant here was a mere volunteer and had no interest in the litigation. The record shows that Great American Insurance Company was one of the insurers of the shipment of the Siemens Schuckertwerke A. G. (R. 249, 269, 738c) and paid its share of the losses of this company.

We assert here, as we did in the Court below, that no case will be found where a libellant or claimant who had any interest whatever in the claim in suit, has been barred from proceeding with the claim on the ground that it was an assignee.

Shipowner asserts that the decision of this Court in *Fretz* v. *Bull*, 12 How. (53 U. S.) 465, is contrary to the decision of the court below. Paradoxically as it may seem, cargo claimant considers this decision a direct authority for its position.

Shipowner, on page 23 has quoted from *Fretz* v. *Bull*, and *Benedict on Admiralty*, First Edition, page 24. It has referred on page 25 to the later editions of Benedict, but without setting forth the context. The shipowner has indulged in the all too prevalent vice of partial quotation—of extracting a few lines from a statement without reference to the complete statement, or the facts surrounding the statement.

The case of *Fretz* v. *Bull, supra*, is a direct holding that Great American Insurance Company, having an interest

in this litigation, properly presented this claim as assignee of the remaining interests.

In that case, a vessel owned by Bull & Company and cargo owned by others were lost by collision. The Firemen's Insurance Company paid the cargo owners for the loss sustained. Nothing was paid the libellant, Bull & Company. Action was brought in the name of Bull & Company in its own behalf and on behalf of the Firemen's Insurance Company. Objection was made that the libellant could not prosecute this suit for the benefit of others, it being alleged that the libellant had no interest in the action for cargo damage.

This Court found that Bull & Company did have an interest and, having an interest, held that there was no objection to its bringing the action in its name for the Firemen's Insurance Company. The Court said at page 468:

> "Mr. Atwood, in his testimony, says, how Bull & Co. became united with the insurance company in this suit, though it is not stated in the libel with the precise formality it should have been, yet it appears sufficiently plain in other parts of the libel, and from the proofs in the cause, that the parties named in the libel have respectively an interest, which is covered by the principle just stated, that the same state of facts which will give relief to one will permit others to be joined as libellants. It is no substantial objection, then, that the suit has been brought in the name of Bull & Co., for the use of the Firemen's Insurance Company."

Similarly, in *The Thames*, 81 U. S. 98, this Court, speaking through Mr. Justice Strong, said, at pages 108-9:

> "And we think that the libel was rightly filed in the name of Billopp Seaman. By the indorsement of the bills of lading the legal ownership of the cotton

passed to him, as well as the right to control its delivery. *It is a matter of no importance that the beneficial interest may have been in the bank of which he was cashier. The holder of a legal right may always assert it by suit, though he may be accountable to another for what he may recover. A judgment in his favor may always be pleaded in bar against a suit by the beneficial owner. Besides, it is settled that the agent of absent owners may libel in admiralty, either in his own name or in that of his principals.*" (Italics ours.)

To the same effect see:

*National Interocean Corp.* v. *Emmons Coal Mining Corp.*, 270 Fed. 997;
*The Burgondier*, 34 F. (2d) 120.

In *Benedict on Admiralty*, 5th Ed., Section 244, p. 322, the following is stated:

"The practice of instituting a suit in the name of a person to whom a right has been transferred does not obtain in admiralty, though when libellant has an interest of his own he may also prosecute the assigned claim of another as thereby a multiplicity of suits is avoided, the objection only going so far as to prohibit the prosecution of a claim by one who is really a stranger to it."

No case has been cited by the shipowner holding that an assignee who had an interest in the subject matter of the litigation may not properly maintain an action as an assignee of the remaining interests.

It is submitted that in a situation such as here, where there are a multitude of interested underwriters, the

assignment to one of the interested underwriters, the Great American Insurance Company, and the filing as claimant in its name, is not only legally correct but, from a practical point of view, is plainly the procedure which should be followed. The Court will note from the report of Commissioner Louis W. Arnold, Jr. (R. 535-575) that there were 88 separate claims. In many of these separate claims there were many individual underwriters. For example, see claim No. 7 (R. 539), claim No. 8 (R. 540), claim No. 17 (R. 545), claim No. 20 (R. 548), claim No. 23 (R. 550). To have filed individual claims for all of the interested parties would have needlessly encumbered the record and wasted the time of the court.

The procedure followed here is that customarily followed in admiralty litigation. In fact, it is quite common where many underwriters are involved to assign all claims to one who may have no interest whatever in the litigation. An excellent example of this customary procedure is found in the case of *May* v. *Hamburg-Amerikanische Packetfahrt, etc.*, 290 U. S. 333. In that case underwriters assigned their claim to Mr. Louis H. May, head of the Loss Department of Chubb & Son, insurance agents in New York City. This court recognized that the libellant was merely an assignee. The first paragraph of this Court's opinion reads:

> "The assignee of cargo owners filed libels against the respondent, the owner of the 'Isis' to recover monies deposited as security for general average contribution the deposit being exacted by the respondent as a condition of delivery" (339).

It should be noted that counsel for the underwriters of the nominal libellant, May, and who undoubtedly gave their advices as to the procedure to be followed, were

Messrs. Bigham, Englar, Jones & Houston, of counsel for the shipowner in this case.

For similar suits by assignees in admiralty in part comparable to the present (although in some of the cases enumerated below it is probable the libellant had no interest whatever but solely legal title) see:

*J. V. Lane & Co., Inc.* v. *M. S. California*, 1934 A. M. C. 179;
*Benjamin M. Merklin, Jr.* v. *Johnson & Higgins, et al.*, 1933 A. M. C. 1110;
*Dingfelder* v. *Navigazione Libera Triestina*, 2 F. Supp. 929;
*Chubb* v. *Hamburg-American Packet Co.*, 39 Fed. 439;
*In re Great Lakes Transit Corp.*, 81 F. (2d) 441.

## POINT II.

**Shipowner was not in any way "misled" into filing its petition for limitation of liability.**

Shipowner urges that it was "misled" into filing its petition for limitation of liability because of the "false" statement made by Great American Insurance Company in the libels filed prior to the institution of limitation of liability proceedings. There are two answers to this contention. First, it is not true; secondly, shipowner seeks a review of a pure question of fact decided adversely to it in the Court below.

The DENDERAH was a German ship, engaged in trade from continental ports to South America. She did not call in the United States or in any United States possessions. This was well known to the shipowner, a Brazilian corporation. Moreover, in its petition for limitation of lia-

bility filed in the District Court, Eastern District of New York, shipowner did not even credit Great American Insurance Company with *any* ownership of any claim in its own right. The petition alleges as to the first libel:

> "She (the MANDU) was seized on July 7, 1930, by the United States Marshal, at the instance of the Great American Insurance Company, *as assignee* of certain underwriters and owners and subrogated owners and general average and salvage claimants to shipments of cargo on board the steamship DENDERAH" (R. 55).

With respect to the second amended libel, the petition alleges:

> "The amended libel was filed * * * by the Great American Insurance Company, *as assignee* of certain underwriters and owners of shipments of cargo and general average and salvage claimants of cargo on board the DENDERAH" (R. 57).

With respect to the third libel filed by Great American Insurance Company prior to the institution of these limitation proceedings, the petition alleges:

> "Thereafter, a further libel was filed * * * by Great American Insurance Company on the 25th of October, 1930, *as assignee*, of certain underwriters and owners of shipments of cargo and general average and salvage claimants of cargo on board the DENDERAH" (R. 57).

Attached to the petition for liability was Schedule B (R. 65-75), Schedule C (R. 76-81), and Schedule D (R. 82-87) which set forth specifically the names of the for-

eign assignors to the Great American Insurance Company. It thus appears without question from the petition filed by shipowner that it affirmatively sought the jurisdiction of the Federal Court in the limitation of liability proceedings against the claims of one who, according to the allegations of the petition, was an assignee only.

There can be no question but that shipowner was not misled in any respect. It knew that all the interests involved were foreign, and it knew that any rights which Great American had flowed from foreign sources. As the Circuit Court of Appeals said:

> "The petitioner says that it would have pressed the court to decline jurisdiction when the original libels were filed, if it had not been misled by "false and misleading" allegations in the libels concerning the Great American's acquisition of claims. There is little substance in this. The petitioner must have known all along that the title of the Great American to claims against the Mandu, whether by subrogation or assignment, came from foreign interests. It knew that the cargo on board the Denderah was of European origin and bound for South America. It could not have read the lists of shippers and insurance companies given in the libels as the assignors of the libellant without realizing that nearly all of them were German. The allegations in the libels did not mislead it in any important particular" (R. 738 f).

## POINT III.

**There is no conflict between the decision of Circuit Court of Appeals and the decision of this Court in *Canada Malting Co.* v. *Patterson*, 285 U. S. 413.**

The District Court in its first decision did not dismiss the limitation proceedings because these parties were foreign, but because it held, erroneously, that there was no claimant before the Court.

At the trial in the District Court the shipowner urged that since this was an action between foreigners arising out of a collision in a foreign port the Court, in its judicial discretion, should allow the petition to be withdrawn. As to this contention the District Court, in its decision of July 21, 1937, said:

> "With this I do not agree, as the petition was properly filed here by the shipowner for limitation or exoneration" (R. 503).

The Court also said:

> "There is, in my opinion, no question of jurisdiction here nor is any raised by the claimant" (R. 504).

In the second decision of Judge Inch the petition was dismissed because the Court found (erroneously) that there was no valid claim before it. The Court said:

> "In such circumstances, where there is present no claim capable of being sued upon, a situation is presented where the court should no longer retain jurisdiction of this action."
>
> "Accordingly, it seems to me that the petitioner has a right to now withdraw and discontinue" * * *

> "Let an order be made dismissing the original invalid claim of the Great American Insurance Company and permitting the petitioner to withdraw its petition and discontinue the action and cancelling its stipulation for value. The court declined further jurisdiction" (R. 641-642).

The foregoing decision was reversed by the Circuit Court of Appeals, saying:

> "The petitioner attempts to support the result below as an exercise of the power of the court to decline jurisdiction in a case where the interests are foreign. It is by no means clear that the Judge dismissed the proceeding on that ground, but would appear from the record to have permitted withdrawal of the petition because of a ruling that there were no claimants before the court" (R. 738 e).

We have no quarrel with any of the cases cited by shipowner under its Point II. However, as appears above, there is no conflict with any decision of this or any other court. This Court pointed out in its decision in *Canada Malting Co.* v. *Patterson,* 285 U. S. 413 at p. 418, that an Appellate Court could and would correct an abuse of discretion of the District Court in its decision as to whether it should exercise jurisdiction.

As pointed out by the Circuit Court of Appeals in its decision at p. 738 e of the Record—had the District Court here declined jurisdiction on the ground that the parties were foreign, at the state the proceedings were in at the time of the decision, this would have plainly been an abuse of discretion. However, as the Court did not make such a decision, the point is moot.

## POINT IV.

**The decision of the Circuit Court of Appeals in holding the Mandu contributorily at fault is not in conflict with the decisions of this Court or the decision of any other Court. However, in arriving at its decision providing that only one-fifth of cargo-claimant damages be recovered from the Mandu rather than one-half, as allowed by the District Court, the Circuit Court of Appeals made an erroneous appraisal of the gravity of the faults of the respective vessels in so far as these faults contributed to the damages sustained by cargo-claimant.**

It is of little moment in appraising the degree of fault that the Court found that the DENDERAH was proceeding on the wrong side of the channel, because she was in plain view of those in charge of the MANDU's navigation. Nor does it add to the gravity of the DENDERAH's fault that the Court found that the DENDERAH failed to keep a good lookout, because twenty lookouts on the DENDERAH would not have enabled those in charge of the MANDU to sooner see the DENDERAH and navigate to avoid her. In brief, the DENDERAH took the one necessary precaution to avoid this disastrous collision—she stopped and reversed her engines. As the Circuit Court of Appeals found:

> "While the DENDERAH was not actually stationary at the moment of collision, her speed was not such as to twist the bow of the MANDU" (R. 2206).

Assuming that the DENDERAH were guilty of other faults alleged against her, such as entering the harbor without a pilot and failure to hear the first two signals of the MANDU, these were antecedent faults that occurred long before the collision or even danger of collision and did

not contribute to the result. Even if it can be said that they contributed to the collision, it is clear that they did not bring about or even contribute to the *sinking* of the DENDERAH, which was caused by the failure of the MANDU to stop and reverse her engines. As the Circuit Court of Appeals found:

> "The vessels came together at right angles, and the stem of the MANDU cut a hole 18 feet deep into the starboard side of the DENDERAH just forward of the bridge" (R. 2206).

That the MANDU failed to take this fundamental precaution but continued on at high speed into collision has been found both by the District Court (R. 2170) and the Circuit Court of Appeals (R. 2208). It is practically conceded by the MANDU's witnesses that she should have stopped and reversed her engines because they attempted by false testimony (which was not accepted by either the District Court or the Circuit Court of Appeals) to prove that the MANDU did stop and reverse. The MANDU witnesses even went so far as to testify that the MANDU was going astern through the water at the time of the collision, a ridiculous contention in the face of the physical fact that her stem plowed 18 feet into the DENDERAH's steel hull. As the Court below said:

> "An injury so extensive indicates a very considerable speed by the MANDU at the time of impact and justifies an inference either that she was proceeding too fast when danger first became apparent, or else that she should have discovered the danger and reversed earlier" (R. 2208).

It was this continuing on at high speed into the jaws of collision that caused the extensive damage, *i. e.*, the sinking of the DENDERAH, resulting in damages amounting to

over $350,000. We submit, therefore, that the MANDU's gross negligence in this respect should be assessed at not less than 50% of the damages sustained by petitioner's cargo, which was the amount assessed by the District Court; certainly not 20%, the amount assessed by the Circuit Court of Appeals, without the benefit of briefs or argument on the gravity of fault.

In brief, apportionment under the Brussels Convention (if this Court decides that the Brussels Convention governs the extent of petitioner's recovery) should not turn on the number of faults of a vessel (some minor, some technical, others not contributing) but apportionment should be based on the effect of the particular faults as they bear upon the damages actually sustained. In the instant case the great extent of damage is directly attributable to the excessive speed of the MANDU, as found by both Courts below. No amount of testimony can dispose of the physical facts, which demonstrate that sinking of the DENDERAH and the extensive damage resulting therefrom was caused by the MANDU's failure to stop and reverse in the presence of danger.

In *Postal Steamship Corp.* vs. *El Isleo,* 308 U. S. 378, this Court, quoting from *The Quoque,* 47 F. (2d) 873 (C. C. A. 2), said:

> "The Court of Appeals aptly said: 'It is a hard rule which requires a master when he sees another vessel about to cross his bow with wanton disregard of his rights to stop and allow the arrogant usurper to pursue his wrongful course. But safety is better than pride; and however slight the hope that rules to promote safety will be observed under such circumstances, whatever courts may say, the vessels must be judged according to their legal duties' " (p. 388).

In *The Manitoba,* 122 U. S. 97, this Court said:

> "The facts in this case are very much like those of *The Stanmore,* 10 P. D. 135, where one of two steam vessels, under like circumstances with those of the *Manitoba,* was held in fault for not stopping and reversing, although the collision was mainly caused by the fault of the other vessel, which was also condemned" (p. 109).

In *The Martello,* 153 U. S. 64, this Court said:

> "The necessity of instantly stopping, or at least of a reduction of speed to the lowest point consistent with the maintenance of steerage way, in the presence of an unknown danger, is one which the masters of steam vessels are slow to appreciate; but the courts have had occasion to enforce it so often it can, as a matter of law, be no longer considered doubtful" (p. 71).

In *Bull Steamship Co.* vs. *United States,* 34 F. (2d) 614 (C. C. A. 2), a collision in New York Harbor, one vessel was held at fault for attempting to pass starboard to starboard and the other for not stopping when her one-blast signal had not been answered. As to the latter vessel the Court said:

> "But her duty began before. Her signal had not been answered, and she could not in the nature of things know what the 'Chinook' proposed to do. Under such circumstances a master is bound to stop his way. *The New York,* 175 U. S. 187, 201, 202, 20 S. Ct. 67, 44 L. Ed. 126; *The Albert Dumois,* 177 U. S. 240, 251, 252, 20 S. Ct. 595, 44 L. Ed. 751; *The Munaires,* 1 F. (2) 13, 15 (C. C. A. 2); *U. S.* v. *Grant,* 11 F.

(2) 700 (C. C. A. 1). There is no more important rule, since vessels, though not quite dead, will so reduce their speed that the collision, if it occurs will be insignificant, as certainly would have been the case here. Had the 'Clare' done her duty shortly after her first signal—that is, as soon as she was in doubt as to the 'Chinook's' navigation—this collision would not have happened" (p. 616).

Inasmuch as this Court has unequivocally held that to apportion the loss otherwise than equally is "utterly impracticable" (*The Atlas, supra*) and the degree of fault was not briefed or argued by either counsel in the Circuit Court of Appeals, we submit that a decision which will hereafter stand as a guide post for all future decisions under the Brussels Convention should not be lightly made on its initial presentation to the Court until thoroughly briefed and argued.

Shipowner asserts that the fault of the MANDU "was not established by competent proof" (Brief, p. 34), and that "there was no evidence that the speed of the MANDU was excessive prior to the time when danger first became apparent" (Brief, p. 35). These statements are directly in conflict with the decision of both Courts below. The District Court characterized the MANDU's speed as "excessive" (R. 2170). The Circuit Court of Appeals characterized her speed as "very considerable" (R. 2208). Indeed, it would seem impossible to come to any other conclusion, in view of the fact that the MANDU's bow plowed 18 feet into the steel hull of the DENDERAH.

This is not a case involving "doubt" with respect to the management of the MANDU as claimed by the shipowner (Brief, p. 36). There could be no doubt as to the fault of a vessel which failed to stop and reverse her engines in the presence of danger, and then in an attempt to avoid the consequences of her own acts produced false

testimony to the effect that the MANDU was actually going astern at the time of the collision, which on the physical facts was an impossibility, as the Courts below found.

Nor can the owners of the MANDU successfully claim that the MANDU was placed *in extremis*. These vessels were proceeding in plain sight of each other. The visibility was good. The position of the DENDERAH was as well known to those on the MANDU as the position was known to those on the DENDERAH, and both vessels should have stopped and reversed in order to avoid collision. This the DENDERAH did, but the MANDU failed to do, as both Courts below found. In these circumstances, it does not lie in the mouth of petitioner (shipowner) to say that the MANDU was put *in extremis*. That well settled doctrine does not apply where each vessel is in plain view and each could have avoided collision by appropriate action. As the Court said in *The Coamo,* 280 Fed. 282 (C. C. A. 2):

> "We see the picture as did Quartermaster Rooney, and find the Essex in fault for having produced, by violation of article 19 of International Rules (Comp. St. §7858), a position of danger, and the Coamo at fault for not sooner realizing that danger, and, when it was realized, for doing exactly the wrong thing. In such a situation as this, arguments concerning orders *in extremis* are not profitable, for there was no excuse in permitting the situation to become *in extremis*" (p. 286).

Furthermore, the Circuit Court of Appeals based its decision upon the so-called "glaring faults" of the DENDERAH, which the Court referred to as "no longer disputed" and "are now admitted" by cargo-claimant (Great Ameican Insurance Company) (R. 2206).

The Court below erred in coming to this conclusion. The so-called "glaring faults" were not "admitted" in any respect. The Great American Insurance Company filed 50 cross-assignments of error to the findings and conclusions of the District Court (R. 2192-8). However, in view of the length of the record and our conviction that the record plainly showed the MANDU to be at least equally at fault with the DENDERAH, the cross-assignments of error were not pressed, and upon the argument in the Circuit Court of Appeals counsel for cargo claimant accepted "for the purpose of this appeal" the findings of the District Court.

## CONCLUSION.

**The petition of Companhia De Navegacao Brasileiro for certiorari should be denied.**

Respectfully submitted,

FORREST E. SINGLE,
*Counsel for Great American Insurance Company, Respondent.*

CHAUNCEY I. CLARK,
DOUGLAS D. CRYSTAL,
*Counsel.*

New York, December 7, 1940.